Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service | ) ) ) ) ) | ET 97-99 |

# CONSOLIDATED REPLY OF DIRECTV ENTERPRISES, INC.

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## TABLE OF CONTENTS

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|---|---|---|
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**CONSOLIDATED REPLY OF DIRECTV ENTERPRISES, INC.**

DIRECTV Enterprises, Inc. ("DIRECTV"), hereby replies to the Joint Opposition to Petitions for Reconsideration, Partial Reconsideration, and Clarification ("DEMS Opposition") filed by Digital Services Corporation, Teligent, L.L.C. and Microwave Services, Inc. (collectively, the "DEMS Licensees"), and the Consolidated Opposition of Teledesic Corporation to Petitions for Reconsideration ("Teledesic Opposition"), each filed on July 8, 1997, in the above-captioned proceeding.

On reconsideration, DIRECTV and others have shown that the Commission plainly overstepped its bounds in dispensing with notice and comment procedures in order to adopt the DEMS Order on the basis of the "military function" exception to the APA. Apart from actions taken to address specific Government interference concerns in Washington, D.C. and Denver, Colorado, the rest of the actions taken by the Commission were grounded in commercial policy goals -- the twin desires to ensure nationwide DEMS service and non-interference with Teledesic's proposed NGSO satellite system -- of the type that may be addressed by the Commission *only* through the notice and comment rulemaking process mandated by the APA.

No persuasive reason has been presented by the Commission, the DEMS Licensees or Teledesic as to why the mandatory APA procedures were not followed here.

Congress and the courts have emphasized that the "military function" exception to the APA is narrow in scope,[1] and must be "narrowly construed and reluctantly countenanced."[2] While the approach of the DEMS Licensees and Teledesic to this fundamental rule of law is to ignore it, the Commission simply may not. The Commission must reconsider its actions taken in the DEMS Order, hold a rulemaking to resolve the many issues raised by the wholesale relocation of DEMS licensees from 18 GHz, taking into account the interests of all affected parties, and modify all DEMS licenses appropriately based upon the results of that proceeding. Any other result would be arbitrary and capricious, and would violate DIRECTV's due process rights.

## I. THE COMMISSION'S ACTIONS IN RELOCATING DEMS LICENSEES FROM 18 GHz TO 24 GHz ON A NATIONWIDE BASIS CANNOT BE JUSTIFIED FACTUALLY OR LEGALLY AS AN EXERCISE OF A "MILITARY FUNCTION"

The DEMS Licensees and Teledesic claim that all of the actions taken by the Commission in the DEMS Order -- that is, (1) relocating DEMS licensees in the Washington, D.C. and Denver Colorado areas from the 18 GHz band; (2) relocating all other DEMS licensees in the rest of the country from the 18 GHz band; (3) choosing and reallocating the entire 24 GHz band for DEMS use; and (4) quadrupling the spectrum used by DEMS licensees at 24 GHz -- were justified by national security concerns expressed in two letters sent to the FCC by the NTIA. Teledesic, for example, proclaims that the "Executive Branch asked the FCC to do

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1 *Independent Guard Ass'n v. O'Leary,* 57 F.3d 766, 769 (9th Cir. 1995).

2 *Id.* (quoting *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)).

exactly what it did, exactly the way it did it, for national security reasons."[3] And according to the DEMS Licensees, "[n]o one . . . is qualified to second-guess NTIA's (or the Defense Department's) determination" with respect to these sensitive matters, regardless of the agency actions that the determination purports to justify.[4] Such arguments are factually incorrect and directly contrary to the case law construing the APA's "military function" exception.

### A. The National Security Concern Expressed in the NTIA Letters Is Very Narrow In Scope

To begin, the DEMS Licensees and Teledesic have blatantly mischaracterized the magnitude of the national security issue raised in the NTIA letters. Reading the DEMS Licensees and Teledesic Oppositions, one would believe that NTIA had expressed comprehensive national security concerns about the continued existence of nationwide DEMS operations at 18 GHz.[5] In fact, this is not the case.

On January 7, 1997, the NTIA submitted to the FCC a request, encapsulated in the very first paragraph of that letter, that the Commission "protect *two* government earth stations."[6] The NTIA explained that these earth stations, located "in the Denver CO and Washington, D.C. areas," were associated with Government "space stations in the fixed-satellite service that operate

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3 Teledesic Opposition at 2.

4 DEMS Opposition at 2; *see* Teledesic Opposition at 8 (Commission should not second-guess "NTIA invocations of national security").

5 *See, e.g.,* Teledesic Opposition at 5-6 (NTIA request, "in the name of national security," encompassed "all the major details of" the DEMS order).

6 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated January 7, 1997, at 1 ("First NTIA Letter") (emphasis added).

at 17.8 - 20.2 GHz that need to be protected."[7] The NTIA further explained that it had determined that licenses had been granted to DEMS networks that "include both the Denver and Washington areas," and that "co-frequency, co-coverage use of the 17.8-20.2 GHz band by earth stations of the Government fixed-satellite service and the non-Government DEMS will not be possible within 40 km of our earth stations" in those areas.[8]

The follow up letter submitted by the NTIA to the FCC on March 5,1997,[9] also addressing the interference issue, again highlights the very limited nature of the NTIA's national security concern. The NTIA did *not* request that the FCC terminate all DEMS licenses at 18.82-18.92 GHz and 19.16-19.26 GHz, nor did it request "replacement licenses" for all DEMS licensees at 24 GHz; instead, it requested termination and replacement licenses *only* for DEMS operations "*anywhere within the exclusion zones defined in Attachments A*" -- *i.e.,* zones with center coordinates in Washington, D.C. and Denver.[10] Neither did the NTIA request the FCC to exclude all future licensees from using the 18 GHz band; instead, it requested exclusion *only* of future licensees proposing to operate "*anywhere within the exclusion zones defined in Attachment A.*"[11]

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7 *Id.*

8 *Id.* at 2.

9 Letter from Richard Parlow, Associate Administrator, Office of Spectrum Management, NTIA, to Richard Smith, Chief, Office of Engineering and Technology, FCC, dated March 5, 1997 ("Second NTIA Letter").

10 *Id.* at 1, ii) & Attachment A (emphasis added).

11 *Id.* at 1, iv) & Attachment A (emphasis added). In light of the careful limitation of the DEMS relocation request in the NTIA proposal (the Washington, D.C. and Denver exclusion and coordination zones specified in the letter's Attachment A) the suggestion by Teledesic that the Second NTIA Letter "nowhere suggests that NTIA's national

Viewed against a plain reading of the NTIA letters, the suggestion of Teledesic and the DEMS Licensees that the letters contain a "national security" mandate for the Commission to take all of the actions in the DEMS Order is insupportable.[12] To be sure, after having articulated the interference issue involving the Government earth stations in Denver and Washington, D.C., NTIA also attempted to anticipate some of the *commercial* policy concerns with which *the FCC* was likely to grapple. For example, NTIA specifically noted its "understanding" of *the FCC's* desire to have frequencies made available for DEMS use on a nationwide basis,[13] and offered to make spectrum available at 24.25-24.65 GHz for DEMS use -- obviously more spectrum than necessary to address the national security problem identified -- in order to accommodate *Commission* policy goals that might be broader than NTIA's own interference problems. But the mere fact that the NTIA has released government access to spectrum that could facilitate a permanent, nationwide DEMS relocation does not create a nexus to a "military function" that can justify waiving APA notice and comment procedures for the wholesale relocation of DEMS operations outside of Washington, D.C. and Denver.

Nor do commercial spectrum policies become linked to "military functions," as Teledesic and the DEMS Licensees assert, merely by virtue of being voiced by NTIA. Teledesic, for example, argues:

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security concerns related only to the relocation of DEMS in Washington, D.C., and Denver," Teledesic Opposition at 8, is clearly incorrect.

12 The NTIA Letters are unambiguous in their focus on an important, but narrow, interference concern in Denver and Washington. There is no room creatively to "interpret" them broadly, as the DEMS Licensees and Teledesic attempt to do, given the fact that the military function exception is to be "narrowly construed and reluctantly countenanced." *Independent Guard Ass'n*, 57 F.3d at 769.

13 First NTIA Letter at 2.

> As the APA implicitly recognizes, agencies such as the Commission are not military agencies and are not competent to make military judgments. The petitioners appear to advocate an administrative regime under which the Commission second-guesses NTIA invocations of national security in order to ensure NTIA is not giving up more spectrum than necessary, but neither reason nor authority supports the suggestion that the Commission should play such a role.[14]

The fallacy of this argument is that it fundamentally begs the question as to what constitutes a judgment pertaining to "national security," and would instead have courts and agencies bow to invocations of "military function" by Executive Branch agencies no matter how broad. This is not the law, and for good reason. The "military function" exception to the APA simply was not intended to be an "escape clause" that an agency "'could utilize at its whim'" to bypass notice and comment procedures.[15]

According to the courts, and the legislative history of the APA, the determination of a "military function" plainly is an inquiry that does not hinge on the military or civilian nature of the agency in question.[16] The NTIA advises the Commission on many types of spectrum policy, licensing and service rule issues in hundreds of proceedings, including on behalf of the DoD, expressing both military and non-military concerns. It thus is illogical to argue that NTIA's Executive Branch status is or should be completely dispositive of the deference that

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14 Teledesic Opposition at 9; *see* DEMS Opposition at 10 (asserting that Congress "intended agencies to defer to those charged with protecting national security when determining whether to invoke this provision").

15 *Independent Guard Ass'n*, 57 F.3d at 769 (quoting *Alcaraz v. Block*, 746 F.2d 593, 612 (9th Cir. 1984)).

16 *Id.* at 769; *see* S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945) (noting that "since the bill relates to functions, rather than agencies, it would seem better to define functions").

should be accorded its recommendations.[17] Indeed, the FCC, like the DOE in *Independent Guard Ass'n*, has a statutory mandate that also includes both "civilian" and "military" functions.[18] Decisionmakers therefore are instructed to look "not to whether the overall nature of the agency promulgating a regulation is 'civilian' or 'military,' but to the *function being regulated*" in determining whether APA requirements have been properly waived on the basis of this narrow exception.[19]

In this regard, it is plain that the DEMS Order effected a mix of regulatory changes, the majority of which do not relate in any way to a "military function." The Commission expressly found that NTIA's interference concerns could be addressed in their entirety by relocating "the Washington, D.C. and Denver, Colorado [DEMS] operations only."[20] *That finding ends the "military function" inquiry.* The Commission easily could have relocated DEMS operations in those two areas, and then held an expedited notice and comment proceeding to address the issues surrounding a wholesale DEMS relocation, including its concern about promoting nationwide DEMS service, and the concerns of third parties (such as DIRECTV) that

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17 Teledesic and the DEMS Licensees are correct that the Commission should not second-guess the NTIA's decision to release government spectrum for commercial use. That does not mean, however, that the Commission must follow NTIA's suggestions on how the spectrum should be licensed commercially.

18 *Independent Guard Ass'n*, 57 F.3d at 769; *see* 47 U.S.C. § 151 (a fundamental purpose of the FCC is to "make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense. . .").

19 *Independent Guard Ass'n*, 57 F.3d at 769 (emphasis added).

20 *DEMS Order* at ¶ 11.

might be affected by such a move. The Commission did not, however, and its failure to do so cannot legally be sustained.

### B. *Bendix* Affirmatively Undercuts The Commission's Actions

In addition to misconstruing the NTIA letters, the DEMS Licensees and Teledesic also misinterpret applicable law. In particular, they argue that the Commission's actions are supported by *Bendix Aviation Corp. v. FCC*,[21] the lone case cited by the Commission in the DEMS Order as a basis for its decision to forego notice and comment. But a close examination of *Bendix* and the FCC proceedings at issue in that case reveals that the DEMS Licensees and Teledesic have completely misread the facts in *Bendix*. The case not only is entirely distinguishable from the present one, but actually *highlights* the deficiency of the Commission's actions here. In *Bendix,* the Commission afforded petitioners and affected third parties *precisely* the opportunity for notice and comment, and consideration of their interests, that DIRECTV and others have been denied.

*Bendix* involved a series of FCC proceedings that culminated in an order, adopted on April 16, 1958, without prior specific notice and comment,[22] which effected various changes in the Commission's Table of Frequency Allocations. In an action that the DEMS Licensees and

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21 272 F.2d 533 (D.C. Cir. 1959).

22 Amendment to Parts 2, 4, 7, 8, 9, 10, 11, 12, 16 and 21 of the Commission's Rules and Regulations to reallocate certain frequency bands above 25 mc, now designated for exclusive Amateur or other non-Governmental use, to Government services on a shared or exclusive basis, and conversely to reallocate to non-Governmental use certain bands now designated for Governmental use, *Memorandum Opinion and Order,* 17 Rad. Reg. (P&F) 1505 (released April 18, 1958) ("April Order"), *reconsideration denied, Memorandum Opinion and Order*, 17 Rad. Reg. (P&F) 1587 (released July 31, 1958) ("July Order").

Teledesic claim is analogous to the instant case, the Commission invoked national security concerns to reallocate spectrum at 8500-9000 MHz, which had been a band shared between U.S. Government users and commercial licensees in the aeronautical radionavigation service, for exclusive use by the Government for military uses.[23] In the April Order, the Commission provided that commercial 8 GHz licensees could continue to operate at 8 GHz on a non-interference basis with Government licensees until moved to a frequency band to be allocated to the commercial aeronautical radionavigation service at a future date. That same day, the Commission commenced a rulemaking that *proposed* to reallocate the 13 GHz band for displaced 8 GHz aeronautical licensees.[24] On July 31, 1958, after providing notice and opportunity for comment, the Commission denied commercial licensee petitions for reconsideration of the April Order, and on the same day *allocated* the 13 GHz band for commercial use in order to transition licensees from 8 GHz to the higher frequencies.[25]

In denying a challenge to the April and July Orders by a displaced Doppler radar licensee -- the equivalent of the DEMS Licensees here -- the D.C. Circuit found that the agency had not acted arbitrarily and capriciously in re-allocating the 8 GHz band for exclusive Governmental use without notice and comment. The Court found that the Commission had

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23 *Bendix*, 272 F.2d at 540-42.

24 *Id.* at 540-41; *see* 15 Rad. Reg. (P&F) at 1507; Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404; *Notice of Proposed Rulemaking*, 23 Fed. Reg. 2698 (April 23, 1958), Errata, 23 Fed. Reg. 3022 (May 8, 1958).

25 *See* Part 2 - Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404, *Report and Order*, 23 Fed. Reg. 6111 (August 9, 1958) (summarizing order released July 31, 1958).

properly deferred to "essential national defense requirements" to put "all potential users of the frequency in question . . . on immediate notice that at some future date the [8 GHz frequency band] was to be exclusively Government."[26] Moreover, the Court noted that in the proceedings that preceded the April Order, the displaced licensees had received notice and indeed, had affirmatively supported, the re-allocation of 13 GHz spectrum for non-Government aeronautical radionavigation use.[27]

The most important point to note about the facts and holding of *Bendix* is that the "military function" exception in that case was invoked narrowly by the Commission, and was used to justify *only* the re-allocation of the 8 GHz band for exclusive Government radiopositionng use. Contrary to the suggestion of the DEMS Licensees and Teledesic, the exception *was not* used to bootstrap the re-allocation of the 13 GHz band for commercial use in the manner that those parties suggest, nor was the reallocation of the 13 GHz band even challenged in *Bendix*.

To the contrary, as the *Bendix* court noted, there in fact had been a preliminary notice of hearing issued by the Commission as early as November 9, 1956, to address the requirements for the radionavigation service above 8 GHz, including the 13 GHz band.[28] In those proceedings, "[v]irtually every segment of the public . . . licensed to operate radio and

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26 *Bendix*, 272 F.2d at 542.

27 *Id.* at 542-43.

28 *Id.*

television stations was represented,"[29] and testimony expressly included industry views on the reallocation of the 13 GHz band for non-Government use.[30] The Commission expressly took note of these prior proceedings in the April Order.[31] And as a result of those prior proceedings, the Commission in the July Order determined that parties "in a very real sense have *not* been deprived of an opportunity to be heard in this matter"[32]:

> As already pointed out, the Commission, in arriving at its decision to reallocate the affected frequencies, considered the written comments filed in its Docket 11997 proceeding and the comments and testimony in Docket No. 11866. *Representatives of virtually every segment of the industry with an interest in the frequencies under consideration participated in those proceedings. Their requirements and proposals with respect to these portions of the radio spectrum were fully set forth....* Thus the action of April 16, 1958, was not based solely on the representations of ODM as contended by several petitioners *but took into account the views which the industry had just previously placed before the Commission.*[33]

Thus, in *Bendix*, and unlike the present case, "virtually every" affected industry segment had received an opportunity to express its view on the 13 GHz reallocation issues *before* "military function" was invoked by the FCC to relocate 8 GHz commercial uses to 13 GHz.

In addition, in adopting the April Order indicating that 8 GHz users would be displaced in deference to exclusive Government uses, the Commission that same day adopted a

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29 Allocation of Frequencies in Bands Above 850 Mc, *Report and Order*, 27 F.C.C. 359, 360, at ¶¶ 2-3 (adopted July 29, 1959).

30 *Bendix*, 272 F.2d at 542 (petitioners in FCC testimony culminating in April Order "had recognized the availability of a [13 GHz] frequency and had given it their support").

31 April Order, 17 Rad. Reg. (P&F) at 1507, ¶ 6.

32 July Order, 15 Rad. Reg. at 1592, ¶ 10 (emphasis in original).

33 *Id.* (emphasis added).

*Notice of Proposed Rulemaking* that sought to make "available to non-Governmental users as quickly as practicable those [Governmental] bands . . . to be designated as exclusive non-Governmental stations in partial compensation for the loss of the other non-exclusive bands."[34] This notice expressly noted the FCC's proposal to reallocate a large portion of the 13 GHz band for commercial use by licensees relocated from 8 GHz,[35] and ultimately resulted in the express allocation of the 13 GHz band for relocated licensee use three months later in an order released on the same day as the July Order.[36]

The bottom line is that both the relocated licensees and interested third parties in *Bendix* clearly were afforded not one but *two* opportunities to express their interests in and views regarding the reallocation of the 13 GHz band *prior* to any licensee being transitioned from 8 GHz to 13 GHz. That fundamental and dispositive fact stands in marked contrast to the situation here, where the Commission summarily changed the allocation at 24 GHz and reauthorized DEMS licensees there in a manner that may foreclose DIRECTV's proposed used of the 24 GHz band.

A proper application of *Bendix* by the Commission should have yielded a narrow invocation of the "military function" exception, and an opportunity for interested parties to comment on the destination of relocated DEMS licensees. Just as in *Bendix*, the Commission in

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34 Frequency Allocations and Radio Treaty Matters; General Rules and Regulations, Docket No. 12404, *Notice of Proposed Rulemaking*, 23 Fed. Reg. 2698 (April 23, 1958), Errata, 23 Fed. Reg. 3022 (May 8, 1958).

35 *Id.* at 2699.

36 Allocation of Frequencies, Amendment to Part 2 of the Commission's Rules and Regulations, *First Report and Order*, Docket No. 12, 404 (released July 31, 1958).

this case could and should have issued an expedited rulemaking proceeding with respect to the 24 GHz or other bands after it had accommodated the Government's immediate national defense concerns at 18 GHz. Thus, the DEMS Order must be reconsidered, and appropriate proceedings initiated and resolved by the Commission, before any relocation of DEMS from 18 GHz can be finally effected.

## II. THE COMMISSION HAS NOT TAKEN INTO ACCOUNT THE REQUIREMENTS OF INTERESTED PARTIES AT 24 GHz

It is clear from the facts of *Bendix* why there was no challenge by 13 GHz users to the Commission's decision to accommodate displaced GHz licensees at 13 GHz: the Commission had received comment from both 8 GHz licensees and 13 GHz interests *well before* it effected the relocation of 8 GHz licensees to 13 GHz. Aside from the fact that *Bendix* mandates a similar approach here, there are compelling public policy reasons for the Commission to conduct a notice and comment rulemaking prior to the relocation of DEMS to 24 GHz.

DIRECTV has filed with the Commission an application for an expansion BSS system that will make use of the 24 GHz band.[37] DIRECTV thus is entitled to be heard with respect to any action that will affect the operation of that expansion system, and to have the opportunity to study technical information concerning any proposed relocation of 18 GHz DEMS licensees to 24 GHz.

In this regard, it is clear that current publicly available information is deficient with respect to the operational parameters of 24 GHz DEMS systems. Although the DEMS

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[37] Application of DIRECTV Enterprises, Inc. for Authority to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites (June 5, 1997).

Licensees allege that the proposed 24 GHz DEMS allocation is "comparable" to the 18 GHz, DEMS allocation,[38] other petitioners have argued vigorously that DEMS Licensees in fact will reap an enormous spectrum "windfall" by virtue of the Commission's action.[39] It is uncontroverted that the Commission has re-assigned 18 GHz DEMS licensees *four times more* spectrum than their current 18 GHz authorizations.[40] Although DIRECTV leaves it to others to argue the inequities of such a windfall, DIRECTV's concern is not only that the Commission has taken broader action than is necessary to accommodate DEMS operations through an overbroad application of the military function exception, but also that such action will constrain available sharing options that might otherwise facilitate the ability of DEMS licensees to co-exist with FSS uplinks for BSS operations at 24 GHz in the event that this band is affirmed as the proper destination for relocated 18 GHz DEMS operations.[41]

Indeed, although the DEMS Licensees continually characterize the Commission's 24 GHz allocation as comparable "replacement" spectrum,[42] the evidence to date is that the Commission has changed fundamentally the nature and capacity of DEMS operations. WinStar Communications, for example, can scarcely contain its glee that an 18 GHz DEMS license it had acquired from LOCATE has been transformed into a "new-found spectrum asset" of

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38 DEMS Opposition at 28.

39 Petition for Reconsideration of BellSouth Corporation (June 5, 1997), at 16; Petition for Reconsideration of the Millimeter wave Carrier Ass'n, (June 5, 1997), at 15-16; Petition for Reconsideration of Webcel Communications, Inc. (June 5, 1997), at 14.

40 DEMS Opposition at 32.

41 For example, if DEMS was provided less spectrum at 24 GHz, there may not be a significant overlap with proposed BSS use of the spectrum at 24.75-25.25 GHz.

42 *Id.* at 34-35.

fundamentally different value by the Commission's actions in the DEMS Order.[43] WinStar notes that "[w]ith 40 MHz paired channels in the 24 GHz band, WinStar now has service opportunities *it never could consider* at 18 GHz," and asks the Commission to allow it the operational flexibility to "*tak[e] advantage of this unexpected opportunity.*"[44]

In view of such candid statements by an 18 GHz licensee with little incentive to distort the truth, it is difficult to take at face value the statements of the DEMS Licensees that a quadrupling of spectrum is necessary to provide comparable service at 24 GHz. Interested parties have a right to receive additional technical information on proposed 24 GHz DEMS operations, and to submit their own responsive analyses. Contrary to legal precedent and the requirements of the APA, the Commission to date has provided affected parties no opportunity or forum in which to do so.

## III. DIRECTV UNQUESTIONABLY HAS STANDING TO CHALLENGE COMMISSION ACTIONS TAKEN IN THE DEMS ORDER

Finally, Teledesic and the DEMS Licensees also suggest that DIRECTV has no standing to challenge the actions that the Commission has taken in the DEMS Order. DIRECTV, it is argued, "cannot demonstrate any injury from the lack of public notice and comment," since DIRECTV has no "substantive rights" at issue in the relocation of DEMS to 24 GHz[45] and

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43 Petition for Clarification of WinStar Communications, Inc. (June 5, 1997), at 5.

44 *Id.*

45 Teledesic Opposition at 14; *see* DEMS Opposition at 22.

currently "holds no 18 GHz band or 24 GHz band authorizations."[46] These claims simply are wrong.

The D.C. Circuit "has held unequivocally" that where, as here, a party "complains of an agency's failure to provide notice and comment prior to acting, it is that failure which causes 'injury'; and interested parties are 'aggrieved' by the order" embodying the challenged agency action.[47] Thus, interested parties, such as DIRECTV, need not establish "substantive rights" in the 18 GHz or 24 GHz bands, as the DEMS Licensees and Teledesic assert, to complain of the FCC's abject failure here to follow required notice and comment procedures.

Moreover, on the merits, DIRECTV, perhaps more than any other petitioner in this proceeding, clearly meets constitutional and prudential standing requirements to challenge the substantive actions taken by the Commission in the DEMS Order. Indeed, the suggestion of the DEMS Licensees that DIRECTV expressed only a "mere hope or intention to apply" to use the 24 GHz band is puzzling[48] -- and clearly incorrect -- given that the band has been allocated internationally for BSS use for five years, and more importantly, that DIRECTV filed both a Petition for Rulemaking to allocate the 24.75-25.25 GHz band for FSS uplinks to BSS stations, and an application for a six-satellite BSS system to use these bands, on the same day that DIRECTV filed its Petition for Reconsideration of the DEMS Order.[49]

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46 DEMS Opposition at 22.

47 *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (citation omitted).

48 DEMS Opposition at 24.

49 *See* Petition of DIRECTV Enterprises, Inc. To Amend Parts 2, 25 and 100 of the Commission's Rules to Allocate Spectrum for the Fixed-Satellite Service and the

If the DEMS Order remains unmodified, DIRECTV will face the prospect of serious interference constraints with relocated DEMS licensees, and in some areas, a possible inability to uplink its expansion system BSS signals at 24 GHz -- a consequence that would be traceable directly to the Commission's actions in the DEMS Order. Such circumstances plainly would pose "actual economic injury" sufficient to satisfy Article III "injury-in-fact" requirements,[50] and DIRECTV's status as an "actual or potential" 24 GHz spectrum applicant clearly would place DIRECTV within the prudential "zone of interests" protected by the Communications Act.[51] DIRECTV clearly has standing to challenge the Commission's actions taken in the DEMS Order.

## IV. CONCLUSION

For the reasons set forth in DIRECTV's Petition for Reconsideration and this Reply, the Commission should reconsider the actions taken in the DEMS Order, hold a notice

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Broadcasting-Satellite Service, RM No. 9118 (June 5, 1997); Application of DIRECTV Enterprises, Inc. for Authority to Construct, Launch and Operate an Expansion System of Direct Broadcast Satellites (June 5, 1997).

50 *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 397 & n.13 (1987) (recognizing that alteration of competitive conditions has probable economic impact which satisfies "injury-in-fact" test); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940) (one "likely to be financially injured" by agency action has standing to challenge that action); *Coalition for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1315 (D.C. Cir. 1995) (inability to file applications to compete for larger unserved areas due to agency action constituted "actual economic injury sufficient to establish 'injury-in-fact'").

51 *JEM Broadcasting Co.*, 22 F.3d at 326 ("actual or potential license applicants" were "aggrieved" within meaning of 28 U.S.C. § 2344, and thus had standing to challenge FCC action); *see also Coalition for Effective Cellular Rules,* 53 F.3d at 1316 (interest in ensuring agency compliance with statutory licensing procedures "clearly falls" within zone of interests protected by the Communications Act necessary to establish standing to challenge FCC rules).

and comment proceeding, and modify the DEMS licenses accordingly after it has received comment from all interested parties. The deprivation of the opportunity for parties to comment on the DEMS relocation based on the APA exceptions that the Commission has invoked simply cannot be justified.

July 23, 1997

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## CERTIFICATE OF SERVICE

I, James H. Barker, hereby certify that on this 23rd day of July, 1997, true and correct copies of the foregoing Consolidated Reply of DIRECTV Enterprises, Inc. were served by hand-delivery or by Federal Express (*) on the following parties:

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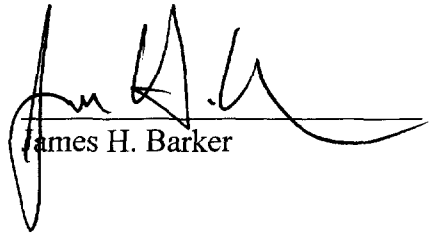

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